In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 158

FROZEN FOOD EXPRESS, APPELLANT

v.

UNITED STATES OF AMERICA ET AL.

No. 159

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

FROZEN FOOD EXPRESS ET AL.

No. 160

AMERICAN TRUCKING ASSOCIATIONS, INC. ET AL., APPELLANTS

v.

FROZEN FOOD EXPRESS ET AL.

No. 161

AKRON, CANTON & YOUNGSTOWN RAILROAD COMPANY ET AL., APPELLANTS

v.

FROZEN FOOD EXPRESS ET AL.

No. 162

EAST TEXAS MOTOR FREIGHT LINES, INC. ET AL., APPELLANTS

v.

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No. 163

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

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AKRON, CANTON & YOUNGSTOWN RAILROAD COMPANY ET AL., APPELLANT

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APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

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OPINIONS BELOW

The opinion of the specially constituted district court of three judges (R1. 104)[1] is reported at 128 F. Supp. 374. The report of the Interstate Commerce Commission in *Determination of Exempted Agricultural Commodities* (R1. 30), which is involved in Nos. 158–161, is reported at 52 M. C. C. 511. The Commission's report in *East Texas Motor Freight Lines, Inc. et al.* v. *Frozen Food Express* (R2. 6), which is involved in Nos. 162–164, is reported at 62 M. C. C. 646.

JURISDICTION

The final judgments of the district court in the two cases before it were entered on February 23, 1955 (R1. 114 and R2. 60). Notices of appeal were filed by the Interstate Commerce Commission (R1. 118 and R2. 65) and the other appellants on or before April 20, 1955. Jurisdiction of this Court is invoked under 28 U. S. C. 1253 and 2101 (b). Probable jurisdiction in both cases was noted on October 10, 1955, and the cases were then consolidated for hearing.

QUESTIONS PRESENTED

1. Whether the Commission's conclusions in *Determination of Exempted Agricultural Commodities* are subject to judicial review.

2. Whether the District Court erred in setting aside the Commission's cease and desist order in

[1] R1. refers to the printed record in Nos. 158–161; R2. to Nos. 162–164.

the *Complaint* case on the ground that fresh and frozen dressed poultry are exempt agricultural commodities under Section 203 (b) (6) of the Interstate Commerce Act.

STATUTES INVOLVED

The pertinent provisions of Part II of the Interstate Commerce Act, 49 U. S. C. 301 et seq., are as follows:

> *Sec. 203 (b) (6), 49 U. S. C. 303 (b) (6):* Nothing in this part, except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment, shall be construed to include * * * (6) motor vehicles used in carrying property consisting of ordinary livestock, fish (including shell fish), *agricultural* (including horticultural) *commodities (not including manufactured products thereof)*, if such motor vehicles are not used in carrying any other property, or passengers, for compensation * * *. [Emphasis added.]
>
> *Sec. 204 (c), 49 U. S. C. 304 (c):* Upon complaint in writing to the Commission by any person, * * * the Commission may investigate whether any motor carrier or broker has failed to comply with any provision of this part, or with any requirement established pursuant thereto. If the Commission, after notice and hearing, finds upon any such investigation that the motor carrier or broker has failed to comply with

any such provision or requirement, the Commission shall issue an appropriate order to compel the carrier or broker to comply therewith. * * *

Sec. 206 (a), 49 U. S. C. 306 (a): * * * no common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway * * * unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: * * *

STATEMENT OF THE FACTS

As already indicated, the several appeals now before this Court are from judgments entered by the district court in two separate but closely-related cases, in each of which the original plaintiff, Frozen Food Express, sued to set aside and enjoin enforcement of an order of the Interstate Commerce Commission.

In the first of the two cases, hereinafter referred to as the *Determination* case, not only the original plaintiff, but the Commission (as defendant), the intervening motor carrier defendants, and the intervening railroad defendants, have appealed from a judgment dismissing the complaint on the ground that the assailed order of the Commission is not subject to judicial review. These appeals are numbered 158, 159, 160 and 161, respectively.

In the other case, which we refer to as the *Complaint* case, the intervening motor carriers, the Commission, and the intervening railroads have appealed from a judgment enjoining and restraining the Commission from enforcing an order theretofore issued by it, insofar as the order required Frozen Food Express to cease and desist from transporting fresh or frozen dressed poultry in interstate commerce for compensation. The three appeals from this judgment are numbered 162, 163, and 164.

Following is a recitation of the proceedings before the Commission and a statement of the contentions of the several parties made in the district court in the two cases:

The Determination Case

In June 1948, the Commission, on its own motion, instituted an investigation into and concerning the meaning of the term "agricultural commodities (not including manufactured products thereof)" as used in Section 203 (b) (6) of the Interstate Commerce Act (49 U. S. C. 303 (b) (6)) (R1. 29).

By that section, as will be noted, motor vehicles used in carrying "agricultural commodities (not including manufactured products thereof)" are exempted from the provisions of the Act requiring a motor carrier engaged in interstate operations for compensation to have a certificate[2] of

[2] Section 206 (a).

public convenience and necessity as a common carrier or a permit as a contract carrier, also from the provisions as to rates and charges[4] and those which require motor carriers to maintain and keep on file with the Commission bodily injury and property damage insurance[5] for the protection of the public; that is, "if such motor vehicles are not used in carrying any other property, or passengers, for compensation." The result is that a carrier operating vehicles in carrying only "agricultural commodities (not including manufactured products thereof)" is not required to hold operating authority or to comply with the rate and insurance provisions in order lawfully to carry those commodities for compensation; but such a carrier is required to comply with all those provisions if he or it carries "manufactured products" of agricultural commodities for compensation.

The proceeding to determine the meaning of the quoted term was in due course assigned for hearing before a Commission examiner. The hearing was conducted at Washington, D. C., in November 1948, and at Atlanta, Ga., in January 1949, a total of nine days being required for receiving testimony and documentary evidence at the two places.

[3] Section 209 (a).
[4] Sections 217 (a) and 218 (a).
[5] Section 215.

The Secretary of Agriculture of the United States, numerous State commissioners of agriculture and other State officials, various associations of producers and shippers, many individual motor carriers, and several associations of motor carriers, intervened in the proceeding, and, to varying extents, presented evidence at the hearing (R1. 32). Most of the evidence was in the form of testimony and exhibits presented by 11 scientists of the United States Department of Agriculture. The testimony of all the witnesses covers 1,509 transcript pages and the documentary evidence is included in 46 numbered exhibits.

The Commission's decision was issued on April 13, 1951, in the form of a report and order. The report covers 71 printed pages of the record (R1. 30–101). The order, which is the order assailed in this suit, incorporated the report by reference, including the findings and conclusions therein set forth (R1. 101). The principal conclusions (R1. 88) were as to the meaning of the term "agricultural commodities (not including manufactured products thereof)" and the principal findings (R1. 89) were as to certain commodities which are included in that term and as to certain others which are not.

The plaintiff below, Frozen Food Express, is a motor common carrier holding certificates issued by the Commission authorizing certain in-

terstate operations, including authority (R1. 6–16) to transport frozen meats, meat products, and dressed poultry from certain named points to certain other points. It alleged in its complaint (R1. 1) that it was and had been transporting these and other commodities between various points in the United States (not named in its certificates), and contended that it had the right to transport them without any authority issued by the Commission; it also alleged that they are agricultural commodities which the Commission in the *Determination* case held to be manufactured products of agricultural commodities. Paragraph III of the amended complaint (R1. 3) alleged that enumerated commodities, most of which the Commission had found to be non-exempt commodities, were exempt agricultural commodities as a matter of law, and that Frozen Food Express was being deprived of the "right granted to it under the laws of the United States" to transport such commodities exempt from regulation (R1. 5).

The Secretary of Agriculture, as intervening plaintiff, did not agree completely with the contentions of Frozen Food Express, as the Secretary listed only eight groups of commodities as to which he contended the Commission's findings and conclusions were erroneous and void. His

complaint (R1. 26) alleged that insofar as the report found and concluded that the eight groups were "neither ordinary livestock nor agricultural commodities" it was unsupported by adequate findings or substantial evidence (R1. 28).

In the answer (R1. 21) filed on behalf of the United States as a defendant, the Department of Justice took issue with Frozen Food Express as to certain commodities, and averred that as to them the Commission's order was "based on substantial evidence and valid." As to certain other commodities, however—and they are (with minor exceptions) the same eight groups complained of by the Secretary of Agriculture—the Justice Department's answer alleged that the Commission's findings were void because there was not substantial evidence in the record to support them (R1. 24).

Numerous motor carriers, associations, and railroads intervened and filed answers supporting the Commission's order.

The following table shows the finding of the Commission with respect to each of the commodities, or commodity groups, complained of by Frozen Food Express, also the contentions of the Departments of Agriculture and Justice with respect to each:

Commodities which Frozen Food Express or some other party contends are unmanufactured agricultural commodities and therefore exempt from regulation.

	Commission found	Agr. Dept. contends	Justice Dept. contends
Slaughtered meat animals and fresh or frozen meat.	Nonexempt	Exempt	Exempt.
Meat products	Nonexempt		Nonexempt.
Dressed and cut-up poultry, fresh or frozen.	Nonexempt	Exempt	Exempt.
Feathers	Nonexempt	Exempt	Exempt.
Shelled eggs	Nonexempt		Nonexempt.
Frozen eggs	Nonexempt		Nonexempt.
Dried egg yolks	Nonexempt		Nonexempt.
Dried egg powder	Nonexempt		Nonexempt.
Cottage cheese	Nonexempt		Nonexempt.
Cream cheese	Nonexempt		Nonexempt.
Butter	Nonexempt		Nonexempt.
Buttermilk	Nonexempt		Nonexempt.
Vitamin D and pasteurized milk	Exempt		Exempt.
Skim milk	Exempt		Exempt.
Powdered milk	Nonexempt		
Condensed milk	Nonexempt		Nonexempt.
Frozen cream, frozen milk, and frozen skim milk.	Nonexempt	Exempt	Exempt.
Dehulled or polished rice	Nonexempt		Nonexempt.
Rolled or pearled barley	Nonexempt		Nonexempt.
Fresh vegetables, washed, cleaned, and packaged in cellophane.	Exempt		Exempt.
Fresh vegetables, cut-up, packaged in cellophane.	Nonexempt		Nonexempt.
Fruits and vegetables, quick-frozen	Nonexempt		Nonexempt.
Canned fruits and vegetables	Nonexempt		Nonexempt.
Dried fruits and vegetables, dried naturally or artificially.	Exempt		Exempt.
Peaches, pecled, pitted, and placed in cold storage in unsealed containers.	Nonexempt		Nonexempt.
Strawberries, canned in syrup in unsealed containers, and placed in cold storage.	(1)		Nonexempt.
Raw shelled peanuts and other shelled nuts.	Nonexempt	Exempt	Exempt.
Ground peanuts	Nonexempt		Nonexempt.
Coffee, ground or roasted	(1)		Nonexempt.
Cottonseed meal	Nonexempt		Nonexempt.
Cottonseed hulls and cotton linters	Nonexempt	Exempt	Exempt.
Beans, dried artificially, and packaged	No finding		Exempt.
Hay, chopped-up fine	Nonexempt	Exempt	Exempt.
Seeds which have been deawned or scarified.	Nonexempt	Exempt	Exempt.
Seeds which have been inoculated	Exempt		Exempt.
Redried tobacco leaf	Exempt		Exempt.

[1] As to two commodities complained of by Frozen Food Express (Strawberries, canned in syrup; etc., and Coffee, ground or roasted), it does not appear that the Commission made specific findings. In view of its findings as to other commodities similarly treated, however, it is reasonable to assume that it would find that these two commodities are manufactured products and therefore nonexempt.

The Complaint Case

On December 23, 1953, three motor common carriers, East Texas Motor Freight Lines, Inc., Gillette Motor Transport, Inc., and Jones Truck Lines, Inc., acting under Section 204 (c) of the Interstate Commerce Act, filed with the Commission a complaint alleging that Frozen Food Express, a motor common carrier, was and had been engaged in transporting fresh and frozen meats, and fresh and frozen dressed poultry, in interstate commerce, to, from, and between points it was not authorized to serve under any certificate of public convenience and necessity issued to it by the Commission. The complainants prayed that the Commission, after appropriate investigation, issue an order requiring Frozen Food Express to cease and desist from engaging in such operations without authority.

In due time, the complainants and Frozen Food Express filed with the Commission a stipulation (R2. 71) and agreed that it should serve as the answer of Frozen Food Express, which therein admitted that it was and had been transporting fresh and frozen meats and fresh and frozen dressed poultry, as alleged by the complainants; but it asserted as a defense that such operations were within the exemption of Section 203 (b) (6) of the Act and might lawfully be performed without authority from the Commission.

The stipulation set forth the operating authorities of each of the complainants and of Frozen

Food Express (R2. 71); showed that each of them was authorized to transport the questioned products between certain named points in the United States; stated the facts as to a number of representative instances of transportation by Frozen Food Express of shipments of the named products (describing truckload shipments of each of the following: fresh beef, dressed poultry, veal trimmings, beef and mutton, cut-up poultry, and frozen turkeys) to and from points it was not authorized to transport such products (R2. 72); described in considerable detail the steps taken in converting livestock to fresh and frozen meats, and in converting live poultry to fresh and frozen dressed poultry (R2. 81); and set forth other evidence the parties considered relevant (R2. 73–87).

The parties having agreed that the facts as thus stipulated should constitute the evidence in the proceeding, and having filed briefs in support of their respective positions, the Commission took the matter under consideration and on July 13, 1954, rendered its decision, in the form of a report (R2. 6) and order (R2. 15). It there found that Frozen Food Express was and had been performing unauthorized operations in that fresh and frozen meats and fresh and frozen dressed poultry were not within the exemption provided in Section 203 (b) (6) of the Act, and ordered Frozen Food Express to cease and desist from engaging in such unauthorized operations.

The complaint (R2. 1) filed in the district court by Frozen Food Express, seeking to have the Commission's report and order set aside, alleged, among other things, that the Congress, by enacting Section 203 (b) (6) of the Act, "has specifically exempted agricultural commodities including fresh and frozen meats and fresh and frozen dressed poultry from the jurisdiction of the Interstate Commerce Commission" and that the report and order of the Commission constitute "an unlawful usurpation of the power and authority of the Congress of the United States." (R2. 4).

The answer of the United States (R2. 29) and the complaint in intervention filed by the Secretary of Agriculture (R2. 33) supported the position of Frozen Food Express, by asserting that the Commission's conclusions were in violation of Section 203 (b) (6) and were unsupported by substantial evidence. By answer (R2. 26, 48), the Commission denied these allegations.

The original complainants before the Commission (East Texas Motor Freight Lines, Inc., et al.) intervened in the district court in support of the Commission's report and order, as did other interested carriers and carrier associations. Those parties have joined the Commission in appealing from the judgment of the district court insofar as the judgment relates to fresh or frozen dressed poultry. As will be noted from the opinion, 128 F. Supp. 374, 380–381 (R2. 50, 58), the

district court sustained the Commission's conclusion that fresh and frozen meats are non-exempt commodities. No appeal has been taken from that holding.

SUMMARY OF ARGUMENT

I

The court below erred in holding, upon the authority of *United States* v. *Los Angeles & S. L. R. Co.*, 273 U. S. 299, that the Interstate Commerce Commission's report and order in *Determination of Exempted Agricultural Commodities* is not reviewable by the Federal courts. While the valuation order in that case did not threaten any person with direct consequences of governmental action until after further proceedings before the Commission, the Commission's action in the *Determination* proceeding confronts unauthorized (noncertificated) carriers which carry nonexempt commodities with the risk of civil and criminal sanctions, and authorized (certificated) carriers who carry such commodities without express authority from the Commission, with the further threat of revocation of certificates.

The Commission's conclusions as to the commodities which are included within the exemption of Section 203 (b) (6) for "agricultural commodities (not including manufactured products thereof)" are reviewable under *Columbia Broadcasting Co., Inc.* v. *United States*, 316 U. S. 407, and *El Dorado Oil Works* v. *United States*,

328 U. S. 12. The fact that the Commission's report and order were not addressed to named persons and did not in terms require or prohibit action by anyone does not preclude review by the courts.

Viewed as interpretative rules, the Commission's conclusions in *Determination of Exempted Agricultural Commodities* are reviewable under *Federal Communications Commission* v. *American Broadcasting Co.*, 347 U. S. 284.

Even if the Commission's conclusions in the *Determination* case are not regarded as rules, they are reviewable as a declaratory order under Section 5 (d) of the Administrative Procedure Act. Since the *Determination* satisfies the requirements of Section 5 (d) for such a declaratory order, it is unimportant whether the Commission so labelled its action. The practical need for review of such administrative action is shown not only in the circumstances of the instant situation, but also in *Charles Noeding Co.* v. *United States*, 29 F. Supp. 537.

The constitutional requisite of a case or controversy will be satisfied if the *Determination of Exempted Agricultural Commodities* is subject to challenge only at the suit of persons who have such an interest in the matter as constitutes "standing to sue."

II

In the *Complaint* case, the court below erred in setting aside the Commission's order directing

Frozen Food Express to cease and desist from unauthorized motor transportation of fresh and frozen dressed poultry, upon the ground that such dressed poultry is an exempted agricultural commodity under Section 203 (b) (6) of the Act.

In the *Complaint* case, the Commission did not rely solely upon its prior conclusion in the *Determination* case. In addition, it had before it substantial evidence which again showed that the conversion of live poultry to dressed poultry resulted in a manufactured food product, both in fact and in general understanding. The court below, relying heavily upon *Interstate Commerce Commission* v. *Kroblin,* 113 F. Supp. 599, affirmed 212 F. 2d 555, certiorari denied 348 U. S. 836, decided as an original matter that fresh and frozen dressed poultry was not an exempt "agricultural commodity."

The Commission's contrary conclusion represented a reasonable application of Section 203 (b) (6) to facts rooted in substantial evidence. In the absence of statutory language or history repelling the Commission's conclusion, it should be sustained as a rational exercise of the Commission's responsibility to give effect, in the light of its continuing experience, to all of the purposes of the Interstate Commerce Act. *Levinson* v. *Spector Motor Co.,* 330 U. S. 649; *Gray* v. *Powell,* 314 U. S. 402; *10 East 40th St.* v. *Callus,* 325 U. S. 578; *O'Leary* v. *Brown-Pacific-Maxon,* 340 U. S. 504.

ARGUMENT

I

The Commission's Decision in Determination of Exempted Agricultural Commodities, 52 M. C. C. 511, Is Subject to Judicial Review

The court below dismissed the complaint on the ground that the report and order of the Commission is not an "order" subject to judicial review, citing *United States* v. *Los Angeles & S. L. R. Co.*, 273 U. S. 299. We submit that the court erred, in view of the nature of the Commission's decision and of later decisions of this Court.

Sections 206 and 209 of Part II of the Interstate Commerce Act (originally the Motor Carrier Act) prohibit interstate operation by motor common or contract carriers except as authorized by common carrier certificates of public convenience and necessity or motor carrier permits issued by the Commission pursuant to Sections 207 or 209. Where unauthorized operations occur, the Commission, acting under Section 204 (c) may issue an order requiring the carrier to cease and desist from such illegal operations. Under Section 212, wilful violation of such a cease and desist order is a ground for revocation of a certificate or permit. Section 222 (a) provides that any person knowingly and wilfully violating any provision of the Act shall, upon conviction, be fined not more than $100 for the first offense and not

more than $500 for any subsequent offense, and that "Each day of such violation shall constitute a separate offense." Section 222 (b) authorizes the Commission to apply to the district courts of the United States for injunctions restraining violations of the Act or of rules, orders, or certificates issued by the Commission.

Section 203 (b) contains various exemptions from all of the provisions of Part II except the provisions of Section 204 relating to "qualifications and maximum hours of service of employees and safety of operation or standards of equipment." One of the most important of these exemptions is that in Section 203 (b) (6) for "motor vehicles used in carrying property consisting of ordinary livestock, fish (including shell fish), or agricultural commodities (not including manufactured products thereof), if such motor vehicles are not used in carrying any other property, or passengers, for compensation."

The interpretation of this agricultural commodity exemption is of daily importance in the administration of the Act—both to the Commission and to the transportation industry. Both the Commission and motor carriers must know what operations are subject to the certificate and permit provisions of the Act. Unauthorized carriers (i. e., carriers without an appropriate certificate or permit) run the risk of incurring civil and criminal penalties if they transport nonexempt commodities. Authorized carriers who

carry non-exempt commodities in volation of their certificates or permits are threatened with revocation of their operating authorities. A carrier who desires to carry a commodity which may or may not be exempt needs to know whether he must undertake the expense and trouble of a proceeding to obtain an appropriate certificate or permit from the Commission, and whether, after he has acquired such authority and expensive and often specialized equipment (e. g., refrigerated trucks), he will be subject to unlimited competition from non-regulated carriers.

In 1948, the Commission on its own motion instituted an investigation "into and concerning the meaning of the term 'agricultural commodities (not including manufactured products thereof)' as used in Section 203 (b) (6) of the Interstate Commerce Act." (R1. 29) As stated in the Commission's report (R1. 33), the institution of the investigation "stemmed from petitions filed by the Secretary of Agriculture and numerous agricultural interests" in *Harwood Contract Carrier Application*, 47 M. C. C. 597. Therefore, the Commission simultaneously reopened the *Harwood* case for further hearing on a consolidated record with the investigation proceeding (R1. 32). Generally, as the Commission's

[6] In the *Harwood* case, the Commission applied the "channel of commerce" principle which it had evolved in earlier cases dealing with Section 203 (b) (6). In *Determination of Exempted Agricultural Commodities*, the instant case, the Commission rejected the "channel of commerce" principle (R1. 45–49).

report shows, the purpose of the investigation was to resolve uncertainties, and controversies both among shippers, carriers and among interested Federal and State agencies as to the scope of the exemption for "agricultural commodities (not including manufactured products thereof)."

The Commission's order instituting the investigation (R. 29) was published in the Federal Register (13 F. R. 3492). In November 1948 and January 1949, hearings were held before a hearing examiner, who received extensive evidence from representatives of the Department of Agriculture and other interested persons. Following a recommended report by the hearing examiner and oral argument before the Commission, the Commission issued the report and order involved here. The report consists of an extensive discussion of the evidence and of the history and purpose of Section 203 (b) (6) and sets forth the Commission's determination as to whether each of many specified commodities is included in the exemption for "agricultural commodities." The order recites that "full investigation of the matters and things involved has been made, and that the Commission, on the date hereof has made and filed its report on oral argument herein containing its findings of fact and conclusions thereon, which report [and the Commission's report in the *Harwood* case, *supra*] are hereby referred to and made a part hereof,"

and ordered that the investigation proceeding be discontinued.[1]

The plaintiffs in this case were Frozen Food Express and the Secretary of Agriculture. Frozen Food Express, a motor carrier, asserts (R1. 2–3) a right to transport without authorization from the Commission various commodities which the Commission, in its *Determination of Exempted Agricultural Commodities*, classified as nonexempt commodities. Plaintiff Frozen Food Express alleges that "the Commission is threatening to enjoin complainant's transportation of such exempted agricultural commodities (not including manufactured products thereof) and is threatening to file complaints against complainant and unless this Honorable Court enjoins and restrains the Interstate Commerce Commission from enforcing or recognizing the Determination of Exempted Agricultural Commodities Decision and Order that complainant will be deprived of the right granted to it under the laws of the United States" (R1. 5).

The plaintiff Secretary of Agriculture is authorized under Section 201 of the Agricultural Adjustment Act of 1938 (7 U. S. C. 1291) "to make complaint to the Interstate Commerce Commission with respect to rates, charges, tariffs, and practices relating to the transportation of farm products, and to prosecute the same before the

[1] The application in the reopened *Harwood* proceeding was denied because of non-prosecution by the applicant.

Commission." Also, under Section 201, in cases involving rates, charges, tariffs, and practices relating to the transportation of farm products, "the Secretary shall have the rights of a party before the Commission and the rights of a party to invoke and pursue original and appellate judicial proceedings involving the Commission's determination." The Secretary of Agriculture has challenged the Commission's *Determination* with respect to eight named commodities which the Commission concluded were not exempted agricultural commodities (*supra*, p. 10).[*]

The court below, in holding *sua sponte* that the Commission's action in the *Determination* case was not reviewable, relied exclusively (R1. 108–109) upon the following language from *United States* v. *Los Angeles & S. L. R. Co.*, 273 U. S. 299, 309–310:

> The so-called order here complained of is one which does not command the carrier to do, or to refrain from doing, any thing; which does not grant or withhold any authority, privilege or license; which does not extend or abridge any power or facility; which does not subject the carrier to any liability, civil or criminal; which does not

[*] While the Commission has not questioned the standing of the Secretary of Agriculture to challenge its determination, the question of whether "practices" as used in Section 201 is limited to matters related to "rates, charges, tariffs" or whether it embraces such matters as the scope of the agricultural commodity exemption is not yet fully settled. See opinion of the court below at R1. 110.

> change the carrier's existing or future status or condition; which does not determine any right or obligation. This so-called order is merely the formal record of conclusions reached after a study of data collected in the course of extensive research conducted by the Commission, through its employees. It is the exercise solely of the function of investigation. * * *

We submit that the *Los Angeles & S. L. R. Co.* case is clearly distinguishable from the instant case. In that case, the valuation order involved would have no practical impact except in and following future rate or other proceedings before the Commission. Moreover, it was unpredictable in that case whether alleged errors in valuation would be significant in a future proceeding which might well involve factors other than value. As this Court noted (273 U. S. at 311), "it is at least possible that no proceeding will ever be instituted, either before the Commission or a court, in which the matters now complained of will be involved or in which the errors alleged will be of legal significance." By contrast, in the instant case, the Commission's formal conclusions as to the commodities which are or are not exempt agricultural commodities has an immediate practical impact upon carriers who are transporting or who desire to transport any of the commodities in question, as well as upon the shippers of such commodities who need to know now whether they are free to bargain with exempt carriers or

whether they must pay the filed charges of authorized carriers.

The situation in the *Los Angeles & S. L. R. Co.* case did not leave the carrier there involved threatened with criminal penalties. In the instant case, the Commission's decision in the *Determination* case warns every motor carrier who without authority from the Commission transports commodities which it has held to be exempt, that it does so at the risk of incurring criminal penalties under Section 222. Such a risk or threat has been regarded by this Court as a heavy factor in holding that action of the Commission is reviewable. *Shields* v. *Utah Idaho Central R. R.*, 305 U. S. 177. And see *A. F. of L.* v. *Watson*, 327 U. S. 582.

Still other decisions of this Court have qualified or explained the quoted language from the *Los Angeles & S. L. R. Co.* case. Thus, in *Columbia Broadcasting System, Inc.* v. *United States*, 316 U. S. 407, 416, it was emphasized that "The particular label placed upon [its order] by the Commission is not necessarily conclusive, for it is the substance of what the Commission has purported to do and has done which is decisive." That case involved the question of whether a broadcasting network could challenge the chain broadcasting regulations of the Federal Communications Commission which purported to restrict, under threat of refusal to renew station licenses, the freedom of individual stations to contract

with the network. In holding that the regulations were reviewable in a suit by the network, this Court pointed out (316 U. S., at 417) that "regulations which affect or determine rights generally, even though not directed to any particular person or corporation, when lawfully promulgated by the Interstate Commerce Commission, have the force of law and are orders reviewable under the Urgent Deficiencies Act. *Assigned Car Cases,* 274 U. S. 564; *United States* v. *B. & O. R. Co.,* 293 U. S. 454." See also *Powell* v. *United States,* 300 U. S. 276. *El Dorado Oil Works* v. *United States,* 328 U. S. 12, 18–19, illustrates that findings by the Interstate Commerce Commission may constitute a reviewable "order", although in form the Commission's order in that case merely directed that the proceeding be discontinued, as in the instant case, and did not prohibit or require action by any person. In that case, the Commission was exercising primary jurisdiction on an issue involved in a pending lawsuit between private parties, pursuant to this Court's decision in *General American Tank Car Corp.* v. *El Dorado Terminal Co.,* 308 U. S. 422

More recently, in *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U. S. 123, 141, this Court noted that "We have long granted relief to parties whose legal rights have been violated by unlawful public action, although such action made no direct demands upon them." Accord-

ingly, in the instant case, we believe that it is not controlling that the Commission's *Determination* case did not require or prohibit action by any named person.

Also, the instant case is clearly distinguishable from the situations involved in *International Longshoremen's & Warehousemen's Union* v. *Boyd,* 347 U. S. 222, and *United Public Workers* v. *Mitchell,* 330 U. S. 75. In both of those cases, Federal courts were asked to interpret and invalidate acts of Congress or regulations by persons to whom those statutes were not yet applicable. Thus, in the *Boyd* case, resident aliens sought to learn in advance of going from the continental United States to work in the Alaska fisheries, whether under the Immigration and Nationality Act of 1952 they would be treated on their return as aliens entering the United States for the first time. In holding that their suit did not present a "case or controversy," this Court characterized the situation as follows (347 U. S., at 223–224):

> Appellants in effect asked the District Court to rule that a statute the sanctions of which had not been set in motion against individuals on whose behalf relief was sought, because an occasion for doing so had not arisen, would not be applied to them if in the future such a contingency should arise.

In the instant case, in contrast, the correctness of the Commission's *Determination of Exempted Agricultural Commodities* is of immediate practical concern to every carrier, such as Frozen Food Express, which is carrying without authority from the Commission commodities which the Commission has determined to be non-exempt, as well as to competing authorized carriers, such as the appellant carriers in the companion *Frozen Food Express* case (Nos. 162–164).

If the Commission's conclusions in the *Determination of Exempted Agricultural Commodities* are viewed as interpretative rules, such a characterization does not make the *Determination* unreviewable by the courts. This Court has already held that Section 204 (a) (6) of Part II of the Interstate Commerce Act[9] (motor carriers) empowers the Commission to enforce the Act through the issuance of general rules. *American Trucking Assns.* v. *United States*, 344 U. S. 298, 311–312. Moreover, it is settled that such a statutory rule making power may be used to interpret and apply a prohibition which is stated in general terms in the statute itself, and that such interpretative rules may be reviewed by the courts under the Urgent Deficiencies Act. *Fed-*

[9] Section 204 (a) (6) empowers the Commission "to administer, execute, and enforce all provisions of this part, to make all necessary orders in connection therewith, and to prescribe rules, regulations, and procedure for such administration."

eral Communications Commission v. *American Broadcasting Co.*, 347 U. S. 284, 289–290. In that case, this Court reviewed regulations of the Federal Communications Commission interpreting the prohibition of 18 U. S. Code 1304 against broadcasting any "lottery, gift enterprise, or similar scheme," and providing that a policy or practice of violating the prohibition as thus interpreted would be ground for denial of the issuance or renewal of broadcasting licenses. In the instant case, the Interstate Commerce Commission has interpreted the statutory exemption for "agricultural commodities (not including manufactured products thereof)" for the purposes of its licensing functions.

However, we believe that it is not essential to treat the *Determination* as a rule in order to hold it reviewable. The reviewability of the Commission's interpretation as set forth in the *Determination* is not resolved by labelling it as a rule or an adjudication.

We do not urge that every interpretation of the Interstate Commerce Act by the Commission or its staff is or should be reviewable by the courts. Rather, we suggest that the line between non-reviewable interpretations and reviewable agency action is drawn by Section 5 (d) of the Administrative Procedure Act, which provides that "In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, * * * (d)

the agency is authorized in its sound discretion, with like effect as in the case of other orders, to issue a declaratory order to terminate a controversy or remove uncertainty." The Interstate Commerce Commission has jurisdiction to interpret and apply the agricultural exemption of Section 203 (b) (6) in two types of cases in which it is required to hold a hearing: (1) determining applications for certificates of public convenience and necessity or for contract carrier permits pursuant to Sections 207 and 209, and (2) issuing cease and desist orders under Section 204 (c) of the Act. It follows, therefore, that the Commission is authorized by Section 5 (d), after a hearing, to issue a declaratory order containing its conclusions as to the meaning and application of the agricultural commodity exemption of Section 203 (b) (6).

In the instant case, the Commission was not requested in terms to issue a declaratory order under Section 5 (d) of the Administrative Procedure Act, nor did it in terms profess to be issuing such a declaratory order. However, we submit that the significant thing is what the Commission actually did, rather than what it said or did not say as to what it was doing. What the Commission actually did, after a full hearing, was to make a formal determination as to the scope of the agricultural commodities exemption.

The fact that the Commission's Determination did not state whether a license should be issued or

denied or revoked is not controlling. *Columbia Broadcasting System, Inc.* v. *United States,* supra, at p. 419. Nor is it decisive that the Commission's Determination was not accompanied by a cease and desist order directed against a particular person. *Aetna Insurance Co.* v. *Haworth,* 300 U. S. 227.

Section 5 (d) of the APA, authorizing Federal administrative agencies to issue declaratory orders as to questions which they may otherwise determine after a hearing, was modelled upon the Declaratory Judgment Act of 1934. As such, it reflects the transition between *Liberty Warehouse Co.* v. *Grannis,* 273 U. S. 70 (decided less than two months before the *Los Angeles and S. L. R. Co.* case), holding that an Article III court had no jurisdiction to entertain the petition for a declaratory judgment, and *Aetna Insurance Co.* v. *Haworth,* supra, sustaining the Federal Declaratory Judgment Act of 1934.

Thus, the report of the Senate Committee on the Judiciary contains the following explanation of Section 5 (d) (Administrative Procedure Act, Legislative History, Sen. Doc. 248, 79th Cong., 1st Sess., p. 204):

> Thus, such orders may be issued only where the agency is empowered by statute to hold hearings and the subject is not expressly exempted by the introductory clauses of this section.

> Agencies are not required to issue declaratory orders merely because request is made therefor. Such applications have no greater effect than they now have under existing comparable legislation. "Sound discretion," moreover, would preclude the issuance of improvident orders. The administrative issuance of declaratory orders would be governed by the same basic principles that govern declaratory judgments in the courts.

The corresponding explanation in the report of the House Committee on the Judiciary (*Ibid* p. 263) adds that—

> * * * They would be subject to judicial review as in the case of other orders.

Neither the language nor history of Section 5 (d) evidences a Congressional purpose to make reviewable all kinds of informal administrative interpretations. Rather, consciously using the Declaratory Judgment Act as a model, Congress restricted the authority to issue declaratory orders to situations or issues as to which the agency is otherwise authorized to hold hearings. When issued in such cases, "to terminate a controversy or remove uncertainty", Section 5 (d) provides that such orders are to have "like effect as in the case of other orders." Without more, this would mean that such orders are subject to judicial review. In any event, the report of the House Committee expressly states that "they would be subject to judicial review as in the case of other orders."

Accordingly, it must be as applicable to orders of the Commission as to orders of a District Court that—

> Where there is such a concrete case admitting of an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged, the judicial function may be appropriately exercised although the adjudication of the rights of the litigants may not require the award of process or the payment of damages. (*Aetna Insurance Co.* v. *Haworth*, 300 U. S., at 241.)

While the court below emphasized that "the only 'order' entered [by the Commission] was one discontinuing the proceeding and removing it from the Commission's Docket", we submit that this circumstance is irrelevant. It is simply the Commission's procedural mechanics for terminating a formal proceeding which has resulted in a declaratory order under Section 5 (d) of the APA. *American Barge Line Co. Petition for a Declaratory Order*, 294 I. C. C. 796. See also *Arizona Sand & Rock Co.* v. *Southern Pac. Co.*, 280 I. C. C. 285.

What the Commission did in the *Determination* case is strikingly similar, from the standpoint of judicial reviewability, to its action in *New York Commercial Zone*, 1 M. C. C. 665. Each proceeding was an investigation instituted by the Commission into the scope of a partial exemption from regulation provided by Section 203 (b) of

the Act. The *Determination* case was concerned with the agricultural exemption, subparagraph (6) of Section 203 (b); while the purpose of the *Commercial Zone* case was to define and prescribe the limits of the commercial zone of New York City, within the meaning of subparagraph (8) of the same Section 203 (b). Neither proceeding was an adversary one in the sense of a traditional lawsuit. In each, notice was given only to the public, and no carrier was named as a respondent. In neither case did the final order direct any thing. Nevertheless, in *Charles Nooding Trucking Co.* v. *United States*, 29 F. Supp. 537, 543, a three-judge court, after a careful review of the reviewability problem, held that the Commission's order in the *Commercial Zone* case was subject to judicial review.

Admittedly, the "case and controversy" requirement of the Constitution means that not every one has standing to challenge the Commission's *Determination of Exempted Agricultural Commodities.* Thus, a person who is neither transporting nor seeking to transport a commodity which the Commission has determined to be non-exempt, is not entitled to challenge in the courts the Commission's classification of such commodity. An unauthorized carrier of dressed poultry on the Pacific coast presumably has no interest entitling him to challenge the Commission's *Determination* in so far as it relates to peanuts. Restricting the right to challenge all or

any part of the *Determination* to those persons who possess such an interest as would entitle them to challenge a Commission order granting or denying a common carrier certificate or a contract permit authorizing transportation of any of the commodities involved, or a cease and desist order prohibiting such transportation, would be consistent with the purpose of Congress in providing for administrative declaratory orders and would satisfy the constitutional requirement of a case or controversy.

We believe that compelling practical reasons support the view that the Commission's conclusions in the *Determination* are reviewable, subject to the limitations of the standing to sue doctrine. It is high time, 20 years after enactment of the Motor Carrier Act in 1935, that the scope of the agricultural commodity exemption was settled. If that question can be settled in one or a few cases challenging the correctness of the *Determination*, there will probably be avoided a considerable number of court proceedings as to the status of individual commodities. Since these cases would arise in many judicial districts, conflicting decisions would be inevitable, pending resolution by this Court. More important, early, consistent and authoritative determination of the scope of the agricultural commodity exemption will be of great practical value to thousands of shippers and certificated and uncertificated carriers who are involved in the transportation of

the commodities covered by the Commission's determination.

II

The District Court Erred in Setting Aside the Commission's Cease and Desist Order in the Complaint Case on the Ground That Fresh and Frozen Dressed Poultry Are Exempted Agricultural Commodities Under Section 203 (b) (6)

The Commission's order in the *Complaint* case directed Frozen Food Express to cease and desist from transporting fresh and frozen meats and fresh and frozen dressed poultry without appropriate authority from the Commission (R2. 15–16). The court below held that "fresh and frozen meat does not fall within the category either of 'ordinary livestock' or of 'agricultural commodities', and hence is not within the exemption" (R2. 58). No appeal was taken from this portion of the decision below. However, the court below also held, relying largely upon the decision in *Interstate Commerce Commission* v. *Kroblin*, 113 F. Supp. 599 (N. D. Iowa), affirmed 212 F. 2d 555, certiorari denied 348 U. S. 836, that fresh and frozen dressed poultry falls within the exemption for "agricultural commodities (not including manufactured products thereof)". The correctness of the latter holding is before this Court.

Prior to the Commission's decision in the instant *Complaint* case, the Commission had already held in *Determination of Exempted Agricultural Commodities* (involved in the companion case

Nos. 158–161) that fresh and frozen dressed poultry (and fresh and frozen meats) were not exempt commodities under Section 203 (b) (6). We submit that the Commission's decision as to fresh and frozen dressed poultry was correct for the reasons which it stated in both the *Determination* and the *Complaint* cases.

In the *Determination* case, the Commission made the general finding (R1. 88–89) that—

> * * * the term "agricultural commodities (not including manufactured products thereof)" as used in section 203 (b) (6) of the Interstate Commerce Act means: Products raised or produced on farms by tillage and cultivation of the soil (such as vegetables, fruits, and nuts); forest products; live poultry and bees; and commodities produced by ordinary livestock, live poultry, and bees (such as milk, wool, eggs, and honey), but not including any such products or commodities which, as a result of some treatment, have been so changed as to possess new forms, qualities, or properties, or result in combinations.

In both the *Determination* and the *Complaint* cases, the Commission noted that Section 203 (b) (6) separately exempted "ordinary livestock" and "agricultural commodities (not including manufactured products thereof)", from which it concluded that these were separate exemptions so that "ordinary livestock" is not included in "agricultural commodities" etc. Looking to the

definition of "ordinary livestock" in Section 20 (11) as including "all cattle, swine, sheep, goats, horses, and mules, except such as are chiefly valuable for breeding, racing, show purposes, or other special uses," the Commission concluded (R1. 75–76; R2. 8–9, 12–13) that—

> slaughtered animals are not embraced in the definition of ordinary livestock and we are impelled to conclude that the products thereof, such as fresh meat and meat products, do not fall within the description "agricultural commodities" as used in section 203 (b) (6). It logically follows that neither killed poultry nor any products thereof come within the term under consideration. We conclude that poultry other than that alive is not an agricultural commodity within the meaning of section 203 (b) (6).

However, the Commission did not rely solely upon this compelling analogy between dressed poultry and meat.

In the *Determination* case, the Commission had before it evidence as to the methods by which live poultry is converted into fresh and frozen dressed poultry (R1. 72–73). In the *Complaint* case, there was submitted by stipulation more detailed evidence which the Commission summarized as follows (R2. 10–11):

> Chickens and other poultry intended to be used for food are raised on farms or by so-called "commercial broiler houses."

Poultry is raised on farms principally for the production of eggs. Their sale for killing is largely incidental to that production. The commercial broiler houses, on the other hand, are primarily engaged in producing poultry for food purposes. From three to four lots are usually raised and marketed during the course of a year. In most instances, chickens, turkeys, and other poultry are shipped alive from the farm or commercial broiler house [fol. 13] to the processing plant. Only a small percentage of the total number raised are killed and processed by the grower. The principal exceptions are the Long Island, N. Y., duck industry and certain growers' cooperatives, which carry on all operations incidental to the marketing of dressed poultry including the growing, killing, and processing.

In packing plants, the birds are first placed on an endless chain and then carried by the chain through the various stages of processing, which include killing, picking, pinning, singeing, cropping and venting, washing, chilling, eviscerating, packaging, and freezing. Picking is done both by machinery and by hand, the mechanical picker consisting of revolving drums equipped with rubber fingers. In some plants the removal of feathers is accomplished by the use of hot wax. The usual method of chilling is to place the carcasses in metal baskets which are then submerged in tanks of ice water long enough to remove

all body heat. In the eviscerating process, the body cavity is cut open and the viscera removed, with the liver, heart, and gizzard being cleaned and replaced in the carcass. The eviscerated poultry is then usually wrapped in waterproof paper and packed with ice in crates or barrels. Various methods of dry wrapping are also employed. The freezing of poultry must be accomplished as rapidly as possible and is generally done in a mechanically refrigerated room in which the temperature is maintained at minus 40 degrees Fahrenheit and the air is circulated at speeds up to 70 miles an hour. After the birds have been frozen by this quick-freeze method, they are placed in cold storage until ready for shipment.

The Commission's finding was also based upon substantial evidence that dressed poultry is generally regarded as a manufactured product, rather than an agricultural commodity. Thus, there was introduced in evidence a large number of U. S. Government bulletins (R2. 88–192), issued from time to time since 1929, in most of which dressed poultry is listed and classified, not as a farm or agricultural commodity, but as a food product or manufactured product. The first of these publications contained in the printed record is exhibit 5, entitled "Wholesale Prices of Commodities, January 1929", issued by the Department of Labor. It includes "live fowls" in the "farm products" classification (R2. 89), but lists

dressed poultry with beef, pork, and other "meats" in the "Foods" grouping (R2. 91).

Likewise, exhibit 6, entitled "Code for Industrial Classification" and issued by the National Recovery Administration in 1933, lists the growing of poultry under "Agriculture" (R2. 92), and classes "poultry killing, dressing, and packaging, wholesale" as "manufacturing" (R2. 74, 93). Exhibit 7, "Statistical Classification of Imports into the United States", issued by the Department of Commerce in 1933, lists "Birds, including poultry, dead, dressed or undressed" under the classification "Meat Products" (R2. 96). Exhibit 8 from the same publication lists "poultry killing, dressing, and packing, wholesale" among "industries" (R2. 98, 100).

It would unduly lengthen this brief to describe separately and in detail all the publications which are included in the record in this case, hence, we shall refer to only a few others. Exhibit 13, for example, is a "Standard Commodity Classification" issued by the Executive Office of the President in 1943. It lists "Poultry, Dressed: Fresh and Frozen" as a "Manufactured Food" (R2. 132); and a similar publication (exhibit 14) lists under "Manufacturing Industries" establishments "primarily engaged in killing, dressing, packing, and canning poultry" and adds that "Important products in this industry include dressed and packed poultry" (R2. 137). The same classification of dressed poultry as a manu-

factured product and the business of killing and dressing poultry as a manufacturing enterprise is shown in all the other documents of record down to and including exhibit 32 (R2. 174–191), which sets forth regulations prescribed by the Secretary of Agriculture effective May 15, 1953, governing the grading and inspection of poultry, both live and dressed.

Summarizing the evidence of record in the *Complaint* case, it shows (1) that the conversion of live poultry into "fresh and frozen dressed poultry" involves not merely killing the fowls, but numerous other steps necessary in dressing, eviscerating, cleaning, packing, and freezing them; (2) that these operations are not performed by farmers or on farms, but by wholesale packing companies at large processing or manufacturing plants; and (3) that Government publications, reflecting trade usages, have long treated the dressing and packing of poultry as a manufacturing process and both fresh and frozen dressed poultry as manufactured products. On this evidence, the Commission found that fresh and frozen dressed poultry were not "argicultural commodities" within the meaning of Section 203 (b) (6) of the Act, but were "manufactured products thereof", and ordered Frozen Food Express to cease and desist from transporting such products unless and until duly authorized by the Commission.

We believe it is obvious that the Commission's conclusion in the *Complaint* case that fresh and frozen dressed poultry were not exempt agricultural commodities was a permissible construction of the statute in the light of its findings supported by substantial evidence. The court below rejected this view of the Commission's function. Stating that "It is apparent that there is only one ultimate finding called for, namely, whether under the type of processing reflected by the record, the product falls within the statutory definition. The question then is a mixed one of law and fact, calling for the application of the processes of legal reasoning and of principles of statutory construction", the court below apparently decided the issue as an original matter while giving little or no weight to the Commission's conclusion.

We submit that in so doing, the court below erred. In *Levinson* v. *Spector Motor Co.*, 330 U. S. 649, 672, this Court said of similar determinations by the Commission that "As conclusions of law, these do not have the same claim to finality as do the findings of fact made by the Commission. However, in the light of the Commission's long record of practical experience with this subject and its responsibility for the administration and enforcement of this law, these conclusions are entitled to special consideration." See also *Gray* v. *Powell*, 314 U. S. 402, *N. L. R. B.*

v. *Hearst Publications,* 322 U. S. 111, and *O'Leary* v. *Brown-Pacific-Maxon,* 340 U. S. 504.

We believe that the error of the court below is highlighted by this Court's observations in *10 East 40th St. Co.* v. *Callus,* 325 U. S. 578, involving the question of whether certain office building employees were engaged in occupations "necessary to the production" of goods for commerce, so as to be within the overtime pay provisions of the Fair Labor Standards Act. In that case, this Court, speaking through Mr. Justice Frankfurter, pointed out (pp. 579–580) that unlike the Interstate Commerce Act, the Fair Labor Standards Act "puts upon the courts the independent responsibility of applying *ad hoc* the general terms of the statute to an infinite variety of complicated industrial situations" [quoting from *Kirschbaum Co.* v. *Walling,* 316 U. S. 517, 523]. Thus, the opinion continued, "Congress withheld from the courts * * * the benefit of a prior judgment, on vexing and ambiguous facts, by an expert administrative agency" such as the Interstate Commerce Commission [citing authorities].

In the instant case, the proper scope of the agricultural exemption is not an abstract legal question. Rather it is an intensely practical question to be resolved in the light of all of the purposes of Part II of the Act (motor carriers) and of the Commission's experience in administering the Act. In *American Trucking Assn's*

v. *United States*, 344 U. S. 298, 317–318, this Court expressly recognized that the scope to be given to the agricultural commodity exemption must be determined in the context of the whole Act and its objectives.

Applying the principles laid down by this Court, we believe that the court below should have affirmed the Commission's order as having a rational basis in the Act and supported by substantial evidence.

While the court below largely based its decision upon *Interstate Commerce Commission* v. *Kroblin*, 113 F. Supp. 599 (N. D. Iowa), affirmed 212 F. 2d 555 (C. A. 8), certiorari denied 348 U. S. 836, we urge that the *Kroblin* decision is not persuasive in this case. To begin with, the denial of certiorari by this Court "imports no expression of opinion upon the merits of a case".[10]

Moreover, there is an important difference between the *Kroblin* case and the one now before the Court. The former was an enforcement action filed by the Commission seeking to have the district court (one judge) enjoin Kroblin from engaging in the transportation of dressed poultry without authority. The very nature of the action required the court to find the facts. In the *Complaint* case against Frozen Food Express, how-

[10] *House* v. *Mayo*, 324 U. S. 42, 47; also *Griffin* v. *United States*, 336 U. S. 704, 716; *Sunol* v. *Large*, 332 U. S. 174, 181; *Brown* v. *Allen*, 344 U. S. 443, 456.

ever, the Commission was the primary fact-finding body, and its conclusions must be sustained by the reviewing court if authorized by law and supported by substantial evidence. *10 East 40th St. Co.* v. *Callus*, supra.

Finally, it should be noted that in the *Kroblin* case, the lower court decisions gave great weight to the circumstance that various legislative proposals (some initiated or supported by the Commission) for amending Section 203 (b) (6) so as to narrow the agricultural commodity exemption, had failed of enactment by Congress. We contend that this was a mistaken emphasis. As this Court stated in *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 47, "we will not draw the inference * * * that an agency admits that it is acting upon a wrong construction by seeking ratification from Congress. Public policy requires that agencies feel free to ask legislation which will terminate or avoid adverse contentions and litigations." Leaving aside such abortive legislative efforts, we submit that neither language nor the affirmative legislative history of Section 203 (b) (6) (as set forth and discussed in the Commission's report in *Determination of Exempted Agricultural Commodities* (R1. 35–49)) is so clear as to warrant the courts in the *Kroblin* case or the court below in the instant case, from giving little or no weight to the Commission's construction and application of the Act.

CONCLUSION.

For the reasons set forth above, the judgment of the district court in each of these cases should be reversed. The *Determination* case (Nos. 158–161) should be remanded to the district court for review of the Commission's action, while the *Complaint* case (Nos. 162–164) should be remanded with direction to enter a judgment dismissing the complaint.

Respectfully submitted,

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